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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 221 23

TAZE HAMRICK GIBSON, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

ON WRIT OF CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner's
REPLY BRIEF

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MAY IT PLEASE THE COURT:

In its brief the Government has argued that *habeas corpus* subsequent to the performance of work of national importance is the only remedy for a minister of religion who has been illegally ordered to report to a conscientious objectors' camp. This point being fully answered in Joint Brief for Petitioners in *Smith* v. *United States,* No. 66 October Term 1945, and *Estep* v. *United States,* No. 292 October Term 1945, further argument here is unnecessary. See pages 54-105 of that brief.

The Government argues that Gibson went too far. It is said: "Whatever may be the situation of a registrant who upon the final determination of his acceptability refuses to proceed further . . . petitioner is not within this category. By becoming a member of the camp he acquired new rights and duties and by deserting from the camp he purposely failed to perform those duties. In pursuing the course of conduct which he undertook petitioner assumed the risk that the legal advice upon which he relied was correct."*

The legal advice upon which the petitioner relied was given by this court in its decisions in *Falbo* v. *United States,* 320 U. S. 549, and *Billings* v. *United States,* 321 U. S. 542, 554-555, 557. In the *Falbo* decision the court said that "the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp."

Since this court held that it was necessary for Falbo to report for induction in order to exhaust his remedies, and since the Regulations of the Selective Service System governing conduct of registrants classified as conscientious objectors were substantially the same when Gibson was ordered to report, it was necessary for Gibson to report at the conscientious objectors' camp in order to *finalize* his *acceptance* so as to complete the selective process. The preinduction physical examination does not complete the selective process. Falbo had a final-type physical examination prescribed by the Regulations. (Reg. 651.1-651.8; see Government's brief, *Falbo* v. *United States,* No. 73 October Term 1943, pages 105-108.) The final-type physical examination then prescribed for conscientious objectors was the same as the preinduction physical examination now given to all registrants. (See Second Petition for Rehearing, *Falbo* v. *United States,* No. 73 October Term 1943, pages 10-27,

* See Government's brief, note 10, where it is said that petitioner would have been in position to decline to go further "after he had passed his preinduction physical examination and received a Certificate of Fitness from his local board."

overruled 322 U. S. 770; see, also, *Grieme* v. *United States*, No. 883 October Term 1943, Petition for Writ of Certiorari, pages 9-13, certiorari denied, 322 U. S. 744.)

In its brief in this case the Government says that the procedure upon reception of a conscientious objector at a civilian public service camp "differs from that which prevailed at the time of *Falbo's* case. At that time it was possible for a registrant to be rejected upon examination at the camp (see 320 U. S. at 583) and the procedure thus paralleled the procedure for inducting men into the armed forces." This statement of the Government, together with the statement of this court in the *Falbo* decision referred to by the Government in the foregoing quotation, shows that both this court and the Government misapprehended and misconceived the Regulations governing reception of conscientious objectors at civilian public service camps. (See Second Petition for Rehearing, *Falbo* v. *United States*, No. 73 October Term 1943, pages 24-28.)

Even though it was possible for one to be discharged from a civilian public service camp because of physical disability after reporting at such camp, under the Regulations as existing at the time of the *Falbo* case (which now is impossible under amended Regulation 653.11 (c)), it was then and still is now necessary for a conscientious objector to report at the civilian public service camp to finalize his acceptance. (Reg. 653.11 (a), (b) and (c)) Although the Selective Service policy with reference to reception of conscientious objectors at civilian public service camps is discussed in the letter from the National Headquarters of Selective Service System to the Attorney General (Appendix C to Government brief in this case), which fails to show the court specifically at what point the Selective Service System considered the *acceptance* of the assignee to be finalized, the more recent amendments to Regulations 653.11 (c) clearly remove all vagueness and ambiquity from the administrative policy. The latest amendment to this Regulation provides that "the acceptance of the assignee

. . . shall occur when the camp director completes and signs the Order to Report for Work of National Importance." The filling out of this form does not occur until after the examination by the camp physician. Gibson waited until the examination had been given and the forms filled out before he departed from the camp. The substance of the regulations concerning reception of assignees at civilian public service camps has been the same since the first regulations were promulgated. There have been no material changes in Regulation 653.11. Accordingly, the above quoted authoritative administrative statement as to when acceptance at a civilian public service camp occurs must be taken as the law, applicable at all times under Regulation 653.11.

The Government labors under the misapprehension that since it is not now possible for a conscientious objector to be discharged or rejected upon reporting at a civilian public service camp, acceptance is completed upon the taking of the preinduction physical examination. It is not the possibility of rejection or discharge that completes the selective process. It is the final act of acceptance at the camp which completes the selective process.

The Government through sylogism reaches the conclusion that the petitioner is in the same posture as Smith and Estep would have been had they "submitted to induction and then deserted from the armed forces." (Government's brief) This analogy is specious and not apposite, for several reasons. In the first place, there is no induction ceremony or other formality that an assignee is required to undergo before attaining the status of a full-fledged campee. No line is drawn to warn the assignee that he is about to assume a status imposing additional obligations. In the case of a man ordered to report for induction into the armed forces appropriate ceremony is prescribed, affording him opportunity to choose between acceptance of military service or prosecution in the civil court. A campee is and always remains a civilian. He has

no opportunity to choose between the status of an assignee and defending his cause in the civil court. The law requires him to report at the camp in order to do work of national importance under civilian direction. (Reg. 652.11, 653.12) In event he has been illegally classified, he must still report in order to complete the selective process. (*Falbo* v. *United States*, 320 U.S. 549; *Billings* v. *Truesdell*, 321 U.S. 542) Of course, if a minister who had been illegally classified as a conscientious objector had an opportunity to choose between voluntarily performing work of national importance and refusing to perform such work after having completed the selective process, and he voluntarily chose to do work of national importance, then he could be held to have waived his right to challenge the legality of the administrative action. Concededly, since there is no opportunity to make the choice, it cannot be said that a minister who is attempting to exhaust his administrative remedies by completing the selective process has waived his right to challenge the legality of the administrative action.

The Government contends that it is the unqualified duty of each registrant classified as a conscientious objector to report at a civilian public service camp and there remain until administratively released or judicially released by *habeas corpus*. The respondent makes no distinction between registrants liable for the performance of work of national importance and those expressly exempted by Congress from training and service. The Government's argument may be applicable to a person liable for training and service. However, the Government's theory is not applicable to any who are specifically exempted from training and service. It is within the discretion of the Selective Service Director to defer certain persons liable for training and service, or allocate them to perform service elsewhere than in the armed forces. Such persons do not have the same rights as registrants expressly exempted by Congress from training and service. These two types of registrants should not be confused one with the other. It is not

a question of the propriety of the classification made within the authority of the classifying agency if an exempt registrant is ordered to report for work of national importance. In such a situation it is rather a question of want of jurisdiction, lack of authority, or *ultra vires* action, on the part of the administrative agency. In such an instance of illegal action, the order is not voidable but is wholly and inherently void.

Even though an exempt registrant should report to a civilian public service camp for the purpose of exhausting his remedies and thereby subject himself to the custody of the director of the camp, this does not confer jurisdiction upon the camp director. The order to report for induction being void for want of jurisdiction on the part of the board, *a fortiori*, the alleged jurisdiction of the camp director is likewise void for the same reason.

The order of an executive agency commanding a person exempt from military duty to submit to the performance of duty is void for want of jurisdiction. It follows that the orders of a draft board and of a camp director based upon the decision that an exempt person is liable for training and service is "clearly without jurisdiction, cannot protect the officer who executes" them. *Wise* v. *Withers*, 3 Cranch 331, 336.

The pivotal fact to be determined is whether one is exempt by Congress from training and service under the Act. "In relation to these basic facts . . . the question is not the ordinary one as to the propriety of provisions for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions." *Crowell* v. *Benson*, 285 U. S. 22.

The Government has made an analogy of the act of the petitioner in leaving the civilian public service camp with that of a convict escaping from prison contrary to federal statute or the unlawful resistance of a culprit to the

execution of a warrant for arrest. This analogy has been appropriately anticipated and answered in petitioner's main brief. A few points deserve comment, however.

The rule of the cases alluded to by the Government is confined to instances where the process defied is issued by a tribunal having jurisdiction. Inasmuch as the rule advocated by the Government is confined to process merely voidable rather than void, the analogy does not apply to the conduct of a minister exempt by act of Congress in leaving a civilian public service camp that does not have jurisdiction over him because of the *ultra vires* action of his local board. In this instance the order given the petitioner by the draft boards was void rather than voidable, for want of jurisdiction of the local board. Indeed, the draft boards and all persons acting under their direction in assuming jurisdiction over petitioner are liable to petitioner for damages in a tort action at law.* Therefore the cases relied upon by the Government in instances where there has been defiance of a warrant for arrest or escape from a penal institution are wholly inapposite here. Moreover, the line of district court decisions in which it has been held that a deserter could not challenge his classification under the 1917 Act because of his defiance of the authority and taking the law into his own hands, did not involve situations where the registrant was entirely exempt from all training and service under the Act. Furthermore, these decisions are materially weakened by the decisions of the Circuit Court of Appeals in *Ver Mehren* v. *Sirmyer* (CCA-8) 36 F. 2d 876, with which they conflict.

Inasmuch as it is necessary to exhaust administrative remedies by reporting at the civilian public service camp

* *Miller* v. *Horton*, 152 Mass. 540; *Pearson* v. *Zehr*, 138 Ill. 48; *Manning* v. *Ketcham* (CCA-6) 58 F. 2d 948; *Wise* v. *Withers*, 3 Cranch 331, 336. See, also, Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (1927, Harvard University Press, Cambridge, Mass.) pages 44-45, 307-308.

where there is no line drawn or ceremony, it is indeed unfair to deny a minister of religion, who has attempted to protect his rights under the act, his right to challenge the legality of the administrative action because he went *'too far'* when he reported in good faith to complete the selective process as suggested by this court in the *Falbo* and *Billings* decisions. The Government says that the petitioner assumed the risk of following such suggested course of action. The Government would have this court treat petitioner much worse than a man treats his dog. The dog, unaware of the law made for him in the chambers of his master's mind, does not know he has made a mistake until he is whipped by his master. But even a dog is not punished when he does what he is told to do.* Here, however, the Government would have the court punish the petitioner for doing what this court suggested in the *Falbo* and *Billings* decisions. Petitioner respectfully asks, Is not the Government asking the court to go *'too far'?* Will compliance with the Government's request be "equal justice under law"?

* "Scarce any man has the means of knowing a twentieth part of the laws he is bound by. Both sorts of law are kept most happily and carefully from the knowledge of the people: statute law by its shape and bulk: common law by its very essence. It is the Judges (as we have seen) that make the common law:— Do you know how they make it? Just as a man makes laws for his dog. When your dog does any thing you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way Judges make law for you and me. They won't tell a man before hand what it is he *should not do*, they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it."—TRUTH in Jeremy Bentham's *Truth versus Ashhurst* (London, December 17, 1792; printed in 1823 by T. Moses, 30, Wilderness Row, London, England.)

Conclusion

For reasons stated above and on account of the arguments appearing in petitioner's main brief, the relief prayed for in the petition for writ of certiorari should be granted.

TAZE HAMRICK GIBSON, *Petitioner*

By HAYDEN C. COVINGTON
His counsel

January 1, 1946